

# ***JOINT COMMITTEE ON ADMINISTRATIVE RULES***

ILLINOIS GENERAL ASSEMBLY

CO-CHAIR:  
SEN. MAGGIE CROTTY

CO-CHAIR:  
REP. BRENT HASSETT

EXECUTIVE DIRECTOR:  
VICKI THOMAS



700 STRATTON BUILDING  
SPRINGFIELD, ILLINOIS 62706  
271/785-2254

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REP. LOU LANG  
REP. DAVID R. LEITCH  
REP. DAVID MILLER  
REP. ROSEMARY MULLIGAN

## **MINUTES**

**November 13, 2007**

### **MEETING CALLED TO ORDER**

The Joint Committee on Administrative Rules met on November 13, 2007 at 10:30 a.m. in Room 16-503 of the James R. Thompson Center in Chicago IL.

Co-Chair Crotty announced that the policy of the Committee is to allow only representatives of State agencies to testify orally on any rule under consideration at Committee hearings. Other persons are encouraged to submit their comments in writing.

### **ATTENDANCE ROLL CALL**

X Senator Bradley Burzynski	X Representative John Fritchey
Senator James Clayborne, Jr.	X Representative Brent Hassert
X Senator Maggie Crotty	X Representative Lou Lang
X Senator Randy Hultgren	X Representative David Leitch
X Senator Dan Rutherford	X Representative David Miller
X Senator Ira Silverstein	X Representative Rosemary Mulligan

### **APPROVAL OF THE MINUTES OF THE PREVIOUS JCAR MEETING**

Representative Hassert moved, seconded by Representative Lang, to approve the minutes of the October 10, 2007 meeting. The motion passed unanimously.

### **REVIEW OF AGENCY RULEMAKINGS**

#### ***Department of Agriculture – Halal Food Disclosure (8 Ill. Adm. Code 190; 31 Ill. Reg. 2053)***

Senator Rutherford, seconded by Representative Miller, moved that JCAR recommend that the Department initiate rulemaking to implement Public Acts in a more timely manner. This rulemaking was proposed in February 2007, more than 5 years after the effective date of the Public Act requiring the rules (PA 92-394). The motion passed unanimously.

#### ***State Board of Elections – Miscellaneous (26 Ill. Adm. Code 207; 31 Ill. Reg. 12576)***

Senator Hultgren, seconded by Representative Fritchey, moved that JCAR and the State Board agree to extend the rulemaking for an additional 45 days so that the Board can more fully respond to questions from JCAR. The motion passed unanimously.

***Department of Human Services – Food Stamps (89 Ill. Adm. Code 121; 31 Ill. Reg. 14372) (Peremptory)***

Senator Silverstein, seconded by Senator Burzynski, moved that JCAR object to the Department removing dates of incorporations by reference from Section 121.63(f)(2), (f)(5) and (h) of its rule. Removing the dates from incorporations by reference of USDA regulations contravenes Section 5-75 of the Illinois Administrative Procedure Act. The motion passed unanimously.

Senator Crotty asked if any member desired to discuss any emergency, peremptory or exempt rulemaking. Senator Rutherford responded that he wanted to address an emergency rule of the Department of Healthcare and Family Services.

***Department of Healthcare and Family Services – Medical Assistance Programs (89 Ill. Adm. Code 120; effective 11/7/07)***

The Department was represented by Tamara Hoffman, Chief of Staff; Jacqui Ellinger, Deputy Administrator, Medical; and Krista Donahue, Deputy Director.

Senator Rutherford, seconded by Representative Lang, moved that JCAR object to and suspend the emergency rule because, contrary to Section 5-45 of the Illinois Administrative Procedure Act (IAPA), no emergency situation existed that warranted adoption of this entire emergency rule. The agency is maintaining that the loss of the federal SCHIP waiver warrants the adoption of an emergency rule to continue coverage of adults served under that waiver. However, this emergency rule is not limited to that issue. It contains other provisions that this Committee does not recognize as an emergency situation. JCAR recommends that the Department adopt a rule that addresses the loss of the SCHIP waiver. The Committee finds that inclusion of policy within this emergency rule that does not address a valid emergency is not in the public interest.

Senator Rutherford explained that, because emergencies are before JCAR during their entire life, the Committee has decided to address this emergency rule at the November meeting. The Senator maintained that the emergency rule adopted by the Department was much broader in scope than the emergency situation warranted. The Committee recommends that the Department come back with a rule that is narrower in scope, dealing specifically with the current situation affecting SCHIP recipients.

Ms Hoffman stated that the Department has determined that the underlying situation is reasonably consistent with the IAPA's threat to public interest, safety or welfare criteria for use of emergency rulemaking. Healthcare is important. Federal matching funds are at risk, and beyond that, HFS had hoped that the federal government would act not only with respect to SCHIP, but with regard to the horrible emergency situation regarding healthcare in this country.

The federal government did not act. This is a crisis, and Illinois cannot fail to act in this critical emergency situation.

Senator Hultgren asked if HFS has filed a State Plan Amendment that would enable it to receive federal match on the current FamilyCare population.

Ms Hoffman responded that HFS is going to file a new State Plan Amendment, but has not yet done so.

Ms Ellinger clarified that the deadline under federal law for filing such an Amendment is not until the end of the quarter. If the Amendment is approved, the federal funding will retroactively cover all persons served under the Amendment during that quarter.

Senator Hultgren asked why the Amendment had not yet been filed if the Department views this as an emergency situation.

Ms Ellinger stated that HFS has been watching federal action very closely. It does not know how SCHIP is going to be addressed on that level. Now that SCHIP has failed in Congress, HFS is proceeding to preserve any Medicaid money it can get.

Senator Burzynski asked how HFS dealt with SCHIP in this year's appropriations, particularly with respect to the relationship between SCHIP funding and Medicaid funding.

Ms Ellinger stated that the federal waiver under which healthcare services were available for caretaker relatives of children served by SCHIP sunset September 30. At that point, there was hope that Congress would reauthorize SCHIP. Since it has not, HFS believes it has to act now to not put these families at risk.

Representative Fritchey asked if the families at risk are the 15,000 to 20,000 families affected by the Congressional failure to reauthorize SCHIP.

Ms Hoffman responded that they were talking about those families, but also all the families that would be affected by this rule.

Representative Fritchey countered that Ms Ellinger was talking about the families affected by the failure to reauthorize SCHIP.

Ms Ellinger agreed that these are the persons who had received services until September 30.

Representative Fritchey agreed that there is an understanding that these families have been put at risk by the federal failure to act. But he asked how HFS got from addressing those 15,000 to 20,000 individuals to proposing a general expansion of FamilyCare to encompass an additional 147,000 persons.

Ms Hoffman interjected that since this emergency rule was adopted, the Department has already enrolled over 500 into FamilyCare under the expanded eligibility guidelines.

Representative Fritchey stated that the Department undertook this enrollment knowing that the emergency rule was still subject to review by the General Assembly. He again asked how HFS got from 15,000 to 20,000 persons left behind by SCHIP to 147,000 new persons covered under a FamilyCare expansion.

Ms Ellinger responded that over the past year there has been repeated recognition that families with incomes up to 400% of the Federal Poverty Level (FPL) have a difficult time financing healthcare.

Representative Fritchey asked what had happened in DC that triggered an emergency situation not just for the 15,000 to 20,000 people, but also for the 147,000 people.

Ms Hoffman replied that federal inaction was not the only trigger. She believed that the path DC was taking made it more critical for HFS to address this ongoing emergency.

Representative Fritchey asked if the "ongoing emergency" existed prior to Washington's actions.

Ms Hoffman stated that it became clear at that point that Washington was not going to act in a way that would have in any way embraced that part of Illinois' Medicaid program that HFS thinks is very important.

Representative Fritchey asked if the federal government action in any way affected the 15,000 to 20,000 Illinoisans.

Ms Hoffman stated that the way the federal government decided to react affected other populations as well because it excluded them.

[Inaudible comments by Ms Donahue.]

Representative Fritchey stated that the emergency rule was filed November 7, and asked if these persons were at risk October 7, July 7, May 7.

[Inaudible response by Ms Donahue. Generally, these comments explained the recent federal actions.]

Representative Fritchey asked what in the federal action taken since the appropriations process of the past spring and summer prompted HFS to expand FamilyCare eligibility to those with 400% FPL.

Ms Hoffman stated that the Congressional action made it clear that those persons who need healthcare were not going to be part of any agreement.

Representative Fritchey asked if HFS knows what Congress is going to do between now and November 16.

Ms Donahue respond that there is a package being considered. A veto override is needed. As recently as the morning of November 13, it appeared there might be a deal.

Ms Hoffman stated that the Illinois populations are already excluded in that iteration.

Representative Fritchey stated that the short answer is no, we do not know what Washington is going to do.

Ms Hoffman stated that the population HFS is hoping to cover is not part of that proposal.

Representative Fritchey asked if HFS believes it can expand FamilyCare by emergency rule.

Ms Hoffman responded in the affirmative.

Representative Fritchey asked Ms Hoffman if she believes she is well-versed in the operations of JCAR.

Ms Hoffman responded in the affirmative.

Representative Fritchey asked if Ms Hoffman believes JCAR has the authority to rule on this emergency rule.

Ms Hoffman stated her belief that JCAR has the authority to consider it.

Representative Fritchey asked if Ms Hoffman believes JCAR has the authority to suspend the emergency rule.

Ms Hoffman stated that she would rather not make a legal determination, but added her belief that it would be inappropriate for JCAR to suspend the rule. A suspension would not be in compliance with the law because HFS has met its burden.

Representative Lang asked for affirmation that the 147,000 were not receiving access to healthcare within the past 3 months.

Ms Ellinger stated that the emergency rule requires the person to be uninsured for a period of time in order to qualify or meet one of the exceptions in the rule.

Representative Lang stated that some of these persons have been without healthcare coverage for years and years.

Ms Ellinger responded that she had not done a statistical analysis.

Representative Lang asked, presuming the answer is yes, why the Administration didn't pursue a legislative expansion of FamilyCare.

Ms Hoffman said there might have been legislation that did touch on this subsection, but this is not something she has looked into or that HFS considered in deciding that this is an emergency.

Representative Lang stated his belief that JCAR needs to get some better answers. He added that the consensus of JCAR might be to deem the portion of the rule dealing with SCHIP an emergency. After the JCAR meeting, HFS could introduce a rule dealing solely with SCHIP and it's likely such a move would meet little opposition. He asked what triggered the filing of the November 7 emergency rule.

Ms Hoffman cited HFS' realization that the population about which it was concerned was not going to be part of a package adopted in Washington. Until that time, it had hoped it would be included.

Representative Lang stated that, if the 147,000 were affected by a real emergency, Illinois wouldn't even wait for the federal government, but would act itself. If this were an emergency on November 7, it was also an emergency on January 7, last year and the day the Governor took office. He asked what made this more of an emergency on November 7.

Ms Hoffman repeated her earlier statements, and pointed out that HFS didn't act earlier because it was trying to stay involved in the discussions on the federal level.

Representative Lang asked why the State Plan Amendment wasn't filed earlier.

Ms Ellinger stated that HFS is trying to keep its options open to take best advantage of any avenues federal action allowed.

Representative Lang asked if waiting to the end of the quarter supports HFS' contention that this is an emergency.

Ms Hoffman responded that it was not only the federal action that made this an emergency. It has been an emergency for a long time. HFS had to make a determination concerning Illinois' other efforts to increase federal match or save federal match or whatever. One of the other things going on is that the federal government has been trying to push Illinois in a certain direction, and HFS didn't want to be the poster child for the United States while there were discussions still going on that could have put Illinois at risk of losing funding. That was not the only issue.

Representative Lang asked if it is true that Illinois is losing about \$250 million in federal match when it moves recipients from SCHIP to medical assistance.

Ms Ellinger affirmed that under Medicaid the match is 50%; under SCHIP it is 65%.

Representative Lang asked if this is something into which the General Assembly should have some input.

Ms Hoffman responded that the General Assembly has already given HFS the authority to make this decision.

Ms Ellinger added that the Public Aid Code gives HFS the authority to set eligibility levels.

Representative Lang asked, if this is such an emergency, why no one from the Administration bothered to call and explain to him and other members of JCAR why this is an emergency.

Ms Hoffman explained that, from her own perspective, she did not call members or respond to questions from JCAR Staff because she did not have those answers. She was trying to get accurate information together. Her office's computers were down on Friday. She pointed out that she was in attendance at this meeting to answer questions.

Representative Lang stated that he still doesn't have an answer to why he wasn't called and suggested that someone in the Administration might want to put JCAR members' numbers into his or her cell phone. The fact that HFS comes here pleading an emergency when its own actions weren't reflective of this being an emergency causes problems. He asked how HFS would respond to the Committee's proposed Recommendation that HFS address the issue of coverage of persons left behind by SCHIP in a separate rulemaking.

Ms Hoffman replied that, at this point in time, this is not something HFS is considering.

Representative Lang asked if that means the emergency relative to the SCHIP recipients is not so important.

Ms Hoffman stated that HFS believes it is all an emergency.

Representative Lang responded that he would ask the question again until he got an answer. Would you be interested in filing a separate rule just for SCHIP?

Ms Hoffman answered no, not at this time.

Representative Lang asked how HFS could then deem the SCHIP situation an emergency.

Ms Hoffman reiterated that the entire population is the emergency.

Representative Miller noted that he was just looking at the Webster's definition of an emergency – a serious situation or occurrence that happens unexpectedly and demands immediate action. Of the 147,000 being added to FamilyCare rolls, how many do you think will be seen by a practitioner per year?

Ms Ellinger responded that she did not have that number or proportion at this time.

Representative Miller asked who is going to treat these people and how is Illinois going to pay for this.

Ms Hoffman answered that care will be delivered by the providers who have enrolled with the program. HFS believes it has the money to pay for this program.

Representative Miller responded that Illinois has an access to treatment problem with its already strained system. Again, how are we going to pay for this?

Ms Hoffman replied that HFS will pay these claims in the same way it pays for other claims.

Representative Miller asked if there is any dedicated appropriation for an expansion of FamilyCare. If not, and if you just delay payments to providers, providers are likely to not want to continue to participate.

Ms Hoffman replied that she understood that position. HFS believes it can pay for this program.

Representative Miller asked Ms Hoffman to offer specifics. This is pure mathematics. If you add a significant population to a pool with no additional funding and no additional providers, you're stressing a system that's already stressed. As a practitioner, I am very well aware of the strain on the healthcare delivery system. This needs to be talked through a little bit.

Ms Hoffman stated that the Department has done a very good job of shoring up relationships with providers and paying attention to the payment cycle. State funding is all about priorities, and providing healthcare coverage for low and middle income families is a priority for the people of this State and in HFS' budget.

Representative Miller stated that there is no JCAR member who doesn't think healthcare is important. However, any responsible legislator would ask who is going to care for this expanded population and how is the State going to pay for it. HFS is creating more of an emergency down the road. Has this been thought through?

Ms Hoffman answered yes.

Representative Miller asked how HFS selected the 400% FPL cap.

Ms Donahue responded that this was recommended by the Adequate Healthcare Task Force report.

Representative Miller asked for the estimated cost of the FamilyCare expansion.

Ms Hoffman responded that, for FY08, the cost is approximately \$43 million, depending on who signs up. HFS already has over 500 enrollees under the emergency rule. HFS doubts it will be \$367 million in the out years, but it will be talking about that when it talks about its FY09 budget and afterwards.

Representative Miller asked if HFS has identified the \$43 million?

Ms Hoffman answered that she believed it had.

Representative Miller asked where.



Ms Hoffman stated that HFS believes it can cover the \$43 million.

Representative Miller replied that this is part of the frustration. These are legitimate budgetary questions to which JCAR is not receiving any clear answers at this time.

Representative Mulligan asked Ms Hoffman if she had said that, between last Wednesday and the beginning of this week, HFS signed up 500 enrollees.

Ms Ellinger answered yes.

Representative Mulligan asked up to what FPL.

Ms Ellinger said 400% under the emergency rule.

Representative Mulligan asked, if the emergency rule is suspended, what HFS will do with those enrollees.

Ms Hoffman responded that it would be horrible to have to think about that.

Representative Mulligan stated JCAR was thinking about it. Normally when an issue affecting HFS is before JCAR, doesn't the agency call me?

Ms Hoffman replied that she is always available.

Representative Mulligan stated that human services is one of the areas in which she is most involved. HFS was hoping to extend the SCHIP waiver that provided Illinois with a 65% federal match, so it would not have been to the State's benefit to file a State Plan Amendment while it still had hopes for that 65% match. Is that not correct?

Ms Hoffman confirmed that was part of the consideration.

Representative Mulligan added that the point at which HFS finds the 65% will not be forthcoming is when there is no extension of SCHIP or when a compromise plan excludes adult coverage. Her guess is that it may be a year before Illinois finds out whether it can cover adults under SCHIP. Is that accurate?

Ms Hoffman stated that the State should not wait for the federal government to act. This emergency rule is the appropriate action to take.

Representative Mulligan replied that she had not disagreed. As much as she often disagrees with the Administration, in this case she thinks HFS should have waited as long as it could in attempting to preserve the 65% match. Whether Illinois expands FamilyCare is the next question. In most Medicaid issues, it's advisable to get people grandfathered. Do you anticipate that?

Ms Hoffman responded not necessarily. HFS believes it has the authority, that there is an emergency. Ms Hoffman believed Representative Mulligan was asking about the best action for the State of Illinois. HFS believes the best action is to not suspend or object to this rule. With regard to filing the State Plan Amendment, there are lots of instances in which HFS adopted emergency rules and then subsequently adopted the Amendment.

Representative Mulligan stated that Ms Hoffman was missing what she was asking. For the past couple of years ago, the budget enacted by the GA has given the Department authority to use emergency rulemaking to reflect in rule the negotiations with the federal government over the State Plan Amendments. That authority has not been rescinded. Is that what you are doing now with respect to SCHIP?

Ms Hoffman answered that it was part of the factor. HFS believes an emergency exists, and that's why it is going forward, but it would be happy to explain what is happening with SCHIP to Representative Mulligan.

Representative Mulligan replied that Ms Hoffman did not need to explain the whole SCHIP program to her. What she is saying is, HFS has determined that adults are not likely to be covered under SCHIP and will have to move to Medicaid. Then the next step is to expand FamilyCare up to 400% FPL, but HFS won't know what's going to ultimately happen to SCHIP until after the next presidential election. At this point, it can only guess.

Ms Hoffman assented.

Representative Mulligan asked if the HFS plan is to not go forward on State Plan Amendments until it finds out what's happening with SCHIP.

Ms Hoffman agreed that is one of the factors.

Representative Mulligan asked if any other state had gone to 400% FPL, and, if so, under Medicaid or something else.

Ms Hoffman answered that she didn't know.

Representative Mulligan asked if Congress wants to get adults out of SCHIP so it can cover more children.

Ms Hoffman affirmed that's how it's looking.

Representative Mulligan asked if Illinois moves SCHIP adults under Medicaid and raises the FamilyCare cap to 400%, will PCCM (primary care case management) be followed.

Ms Hoffman responded that she would have to get an answer to that.

Representative Mulligan asked whether the federal government tried to force HFS to move the SCHIP adults to Medicaid. What did Ms Hoffman mean when she said the federal government was trying to make Illinois an example?

Ms Hoffman replied that they didn't try to force HFS, but they did suggest that would be the way to go.

Representative Mulligan noted that would save them 15% in federal match. So HFS filed an emergency rule to at least cover the SCHIP group because it was afraid they won't be covered?

Ms Hoffman reiterated that HFS believes there's an emergency for the entire group.

Representative Mulligan stated that JCAR's goal here is to determine what is appropriately included in the emergency rule. If SCHIP falls, Illinois needs to be careful who it grandfathers. Her approach would have been to protect them but to go more slowly than HFS has. If the emergency rule stays in place, HFS files the State Plan Amendment, and the federal government decides to continue SCHIP coverage for adults, can HFS go back?

Ms Hoffman answered that HFS always looks at ways to maximize federal match.

Representative Mulligan asked, therefore, what prompted adoption of this emergency rule.

Ms Hoffman answered that an emergency situation exists, HFS has the authority, and HFS can pay for it.

Representative Mulligan asked if the cost is \$43 million for this fiscal year?

Ms Hoffman answered yes, but noted that cost will be based on actual enrollment.

Representative Mulligan asked how HFS plans to get the federal government to agree to 400% FPL. Doesn't it have to get Medicaid approval?

Ms Hoffman replied that HFS will file a State Plan Amendment.

Representative Mulligan asked if HFS has had any indications that CMMS will approve such an Amendment.

Ms Hoffman did not know.

Ms Ellinger stated that, at one time, HFS had a letter in which it considered moving the SCHIP adults to Medicaid.

Representative Mulligan asked whether, under the State of Maine's plan, enrollees pay a portion of costs.

Ms Ellinger answered that she did not know the details of Maine's plan.

Ms Hoffman offered to take a look at that.

Senator Silverstein asked if HFS also filed a proposed permanent rule?

Ms Hoffman answered yes.

Senator Silverstein asked, if the emergency rule is suspended, what HFS planned for the proposed rule. Would it still pursue the proposed rule?

Ms Hoffman answered yes.

Senator Silverstein noted that this issue would still be alive.

Representative Leitch observed that, in his community, there are providers who are owed over \$1 million in medical assistance payments. The Comptroller announced the other day that there is over a \$1 billion backlog at this time. What is HFS' projection for end-of-year backlog?

Ms Hoffman responded that she didn't have that information with her, but could get it for Representative Leitch.

Representative Leitch asked if the backlog will be as bad as last year or worse.

Ms Hoffman apologized and stated she really couldn't speak to that.

Representative Leitch asked if that would be an important concern in determining whether Illinois has sufficient funds for the expansion created by this emergency rule. How can HFS say Illinois can pay for it when it has at least a \$1 billion backlog now and HFS can't tell us the projection for the rest of the year?

Ms Hoffman answered that she could get those numbers. Clearly she wasn't the only one involved in this decision. HFS finance people were consulted.

Representative Leitch asked Ms Hoffman to please share that information with the rest of the Committee. The State's ability to pay bills has an enormous impact on the willingness of providers to work with Medicaid to provide quality care. He also cannot understand why HFS wouldn't file tonight a separate rulemaking extending Medicaid coverage to those at risk of losing SCHIP coverage.

Ms Hoffman replied that HFS is always available to speak to providers.

Representative Fritchey pointed out that the enrollees would not lose coverage if this rule were suspended because, under the rule, coverage would not begin until next month.

The motion to object to and suspend the emergency rule passed on a rollcall vote of 9-2-0 (Hassert and Mulligan – No).

### **CERTIFICATION OF NO OBJECTION**

Senator Hultgren moved, seconded by Representative Leitch, that the Committee inform the agencies to whose rulemakings the Committee did not vote an Objection, or did not remove from the No Objection List, that the Committee considered their respective rulemakings at the monthly meeting and, based on the Agreements for modification of the rulemakings made by the agencies, no Objections will be issued. The motion passed unanimously.

### **AGENCY RESPONSES**

*Department of Central Management Services – Pay Plan (80 Ill. Adm. Code 310; 31 Ill. Reg. 12608) (Emergency)*

*Department of Children and Family Services – Licensing Enforcement (89 Ill. Adm. Code 383; 31 Ill. Reg. 4511)*

Based on the appropriateness of the agencies' responses, no further action was taken.

### **DECEMBER MEETING DATE**

Co-Chair Crotty announced that the next meeting was scheduled for Tuesday, December 11, 2007, 10:30 a.m., Room 16-503, James R. Thompson Center, Chicago IL.

### **ADJOURNMENT**

Representative Leitch moved, seconded by Senator Hultgren, to adjourn the meeting. The motion passed unanimously.

*Min:0711Nov*